opposition

No. 75-321

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

R.L. SWEET LUMBER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 55-76) is reported at 515 F.2d 785. The Board's decision and order (Pet. App. 1-54) are reported at 207 NLRB 529.

JURISDICTION

The judgment of the court of appeals (Pet. App. 77-78) was entered on June 5, 1975. The petition for a writ of certiorari was filed on August 29, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board's findings that the Company violated the National Labor Relations Act by unilaterally changing the wages and working conditions of a unit of its employees, refusing to negotiate with their bargaining representative, compelling them to join another union, and applying that union's contract to them were barred by the six-month limitations period in Section 10(b) of the Act.

STATUTE INVOLVED

Section 10(b) of the National Labor Relations Act, as amended (61 Stat. 146, 29 U.S.C. 160(b)) is set forth in pertinent part at pp. 3-4 of the petition.

STATEMENT

Since 1952 R.L. Sweet Lumber Company ("the Company") has operated a lumber business on Roe Boulevard in Kansas City, Kansas, where, in addition to selling lumber and other building materials, it manufactured and sold millwork and single-package prefabricated homes (Pet. App. 5-6). The manufacturing employees were members of Carpenters Local 1635, Carpenters District Council of Kansas City, AFL-CIO ("the Carpenters"), and were represented in a separate unit of that union under a collective bargaining agreement (Pet. App. 6). Another unit composed of warehouse and yard employees was represented by Teamsters Local 541 (Pet. App. 5-6).

Because the prefabricated home operation needed additional space, the Company decided to build a new plant for that operation at Olathe, Kansas, 19 miles from the Roe Boulevard plant. Construction of the new

plant began in 1971, at which time the Company also separately incorporated the prefabricated home operation and changed its name to Standard Homes Company (Pet. App. 6, 7).

In January 1972, with the new plant almost completed, the Company transferred an employee from the Teamsters unit at Roe Boulevard to Olathe and hired three new employees to unload the initial lumber deliveries and to do preparatory work, prior to commencement of production (Pet. App. 8, 9). On January 24, the 4 employees were visited by a Teamsters Local 541 business agent and signed authorization cards. Standard Homes Company subsequently recognized the Teamsters and, on February 11, executed a contract with that union which ran from February 7, 1972 until February 2, 1975 (Pet. App. 9). The contract covered "all production and maintenance employees at the Employer's Olathe, Kansas plant including truck drivers," and contained a union security clause requiring all employees to join Teamsters Local 541 within 31 days of employment (Pet. App. 60).

In mid-February 1972, the Company began interviewing pre-fab employees at Roe Boulevard about working at Olathe. Four employees who were members of the Carpenters unit agreed to the change and began work at Olathe between February 23 and February 29, 1972 (Pet. App. 10, 28, 60-61). Prefab production began at Olathe on February 29, with the four employees doing the same work with the same tools as they had at Roe Boulevard (Pet. App. 28). However, the Teamsters contract, with lower wage rates and different benefits than the Roe Boulevard Carpenters contract, was applied to the prefab workers (*ibid.*). They were told that the Teamsters would be the only union at Olathe and were coerced by the Company into joining that union (Pet. App. 28-30).

On February 20, after having been notified of the impending transfer of one of the Carpenters unit employees to Olathe, a Carpenters representative requested bargaining concerning the transfer. The Company replied that the Olathe facility was a wholly owned Delaware corporation and was not part of Sweet Company. "Hence * * * [there was] nothing to discuss" (Pet. App. 11). In March and April, further requests to bargain about the transfer were also denied (Pet. App. 12-13). On August 18, 1972, the Carpenters filed an unfair labor practice charge against the Company (Pet. App. 1-2).

The Board found that the Company's Roe Boulevard and Olathe operations constituted a single employer within the meaning of the Act (Pet. App. 16-21), and that the latter's prefab operations constituted an accretion to the former's Carpenters unit (Pet. App. 21-25). The Board therefore concluded that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally changing the wages and working conditions of the prefab employees after their transfer to Olathe, and by failing to recognize and bargain with the Carpenters as their representative (Pet. App. 33). The Board also concluded that the Company violated Section 8(a)(2), (3), and (1) of the Act by applying the Teamsters contract to the Olathe prefab employees and by insisting that they become members of that union (Pet. App. 30-31).

The Board refused to find that the execution of the contract with the Teamsters was an unfair labor practice because that event had occurred prior to the six-month limitations period of Section 10(b) of the Act (Pet. App. 26).[1] However, the Board found that the

[1]The charge was filed on August 18, 1972 (Pet. App. 1). The six-month period of limitations therefore excluded unfair labor practice prior to February 19, 1972 (Pet. App. 26, n. 36). The collective agreement was executed on February 11, 1972 (Pet. App. 25).

unfair labor practices of refusal to deal with the Carpenters concerning the prefab employees, unilateral changes in those employees' benefits, and compulsion of the employees to join the Teamsters occurred within the six-month period and were therefore not time barred (Pet. App. 27).

The Board ordered the Company, *inter alia,* to bargain with the Carpenters as the representative of the Olathe prefab employees, to withdraw recognition from the Teamsters as the representative of those employees, to cease applying the Teamsters contract to those employees, and to reimburse them for losses they may have incurred due to the Company's unlawful conduct (Pet. App. 39-41, 43-48).

The court of appeals upheld the Board's decision and enforced its order (Pet. App. 55-76). In agreeing with the Board that the violations were not barred by Section 10(b) of the Act, the court rejected the Company's argument that the violations were grounded on execution of the collective agreement, concluding rather "that the substantial active conduct adversely affecting the Carpenters union and those whom it was entitled to represent, and constituting the unfair labor practices found, fell within the six month period" (Pet. App. 68). The court specifically rejected petitioner's argument, repeated here, that *Local Lodge No. 1424, Machinists* v. *National Labor Relations Board (Bryan),* 362 U.S. 411, and appellate decisions following it require a contrary result (Pet. App. 63-68).

ARGUMENT

In *Bryan, supra,* 362 U.S. at 419, this Court held that, where "a collective bargaining agreement and its enforcement are both perfectly lawful on the face of things, and an unfair labor practice cannot be made out except by reliance on the fact of the agreement's original unlawful execution, an event which, because of

limitations, cannot itself be made the subject of an unfair labor practice complaint," the policies underlying the Section 10(b) limitations period preclude converting "what is otherwise legal into something illegal."[2] In an attempt to fit this case within *Bryan,* petitioner asserts (Pet. 10, 15) that the gravamen of the charge here was that the Company had executed a collective agreement with a "minority" union, an event that occurred outside the Section 10(b) period. Petitioner misconceives the nature of the unfair labor practices found by the Board.

As shown above, the Board refused to find, as charged in the complaint, that the Company unlawfully assisted the Teamsters by executing, on February 11, 1972, a contract with it before a representative complement of material handlers were hired, holding that such a finding was barred by Section 10(b). The gravamen of the charges that the Board upheld is that the Company enforced that contract against the *prefab employees* whom the Teamsters "did not represent * * * since, despite their assignment to Olathe, such employees continued to be included in the Carpenters unit at Roe Boulevard" (Pet. App. 27). This action, as well as the Company's subsequent refusal to bargain with the Carpenters respecting the Olathe prefab employees, occurred after Febrary 19, 1972,[3] when the 10(b) period began, and constitutes unfair labor practices wholly apart from the existence, or validity, of the Company's contract with the Teamsters.

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[2]In *Bryan* the employer, outside the 10(b) period, had entered into an exclusive recognition contract, with a union security clause, at a time when the union did not represent a majority of the employees. His only action within the 10(b) period consisted of enforcement of that contract, which was valid on its face.

[3]Prefab production began at Olathe on February 29, 1972 (*supra,* p. 3).

Tennessee Products & Chemical Corp. v. *National Labor Relations Board,* 423 F.2d 169 (C.A. 6) (Pet. 16), is not to the contrary. There, as in *Bryan,* an unfair labor practice could be found only by establishing that a contract, valid on its face, was entered into with the employer's unlawful assistance, an event which occurred outside the 10(b) period (423 F.2d at 179-180). In *National Labor Relations Board* v. *Brown,* 310 F. 2d 539 (C.A. 9) (Pet. 17), the "formation of the Association, execution of the employer-Association contracts, and adoption of the constitution and by-laws of the Association all occurred" outside the 10(b) period, and there was "no substantial evidence in the record to support the finding of the Board that Respondent Employer within the six months period dominated, interfered with, or supported the Association" (310 F.2d at 545-546). Here, as shown, there was "substantial evidence" of unfair labor practice conduct occurring within the 10(b) period.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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